BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GEORGE F. HUFFMAN	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,501
EXODYNE	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY OF THE	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 6, 2011, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on January 10, 2012. Due to a conflict, Board Member Gary R. Terrill recused himself from this appeal and Jeffrey King of Salina, Kansas, was appointed as a Board Member Pro Tem by the Director.

APPEARANCES

Daniel L. Smith of Overland Park, Kansas, appeared for claimant. Michael R. Kauphusman of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board the parties stipulated that if the Board concludes claimant's injury is compensable, claimant has a 20% permanent whole body functional impairment, 5% of which is new and resulting from his January 12, 2009, accident, and that respondent is entitled to a $16,198.57 credit for claimant's preexisting 15% whole body functional impairment. The parties also stipulated at oral argument that claimant's average weekly wage at the time of his accident was $420.00. The parties further stipulated that whether claimant is entitled to future and additional authorized medical treatment are not

issues. If the Board finds claimant is entitled to work disability, the parties agreed at oral argument to the findings of the ALJ concerning wage loss, task loss and work disability.

ISSUES

This is a claim for a January 12, 2009, accident. In the October 6, 2011, Award, ALJ Avery determined (1) claimant sustained personal injury by accident; (2) claimant's average weekly wage is $420.00; (3) claimant has a 5% functional impairment to the body as a whole as a result of this accident; (4) claimant is permanently and totally disabled; (5) claimant has a 100% wage loss, a 62% task loss, and an 81% permanent partial disability; (6) respondent is entitled to a $16,198.57 credit for claimant's preexisting 15% whole body functional impairment; and (7) claimant is entitled to future medical care upon application and review and unauthorized medical care up to the applicable statutory limit. The ALJ awarded claimant temporary total and permanent total disability benefits.

Respondent contends claimant did not meet with personal injury by accident. It argues that if any injury is found, it was only a temporary aggravation of claimant's more serious preexisting problems. Respondent contends claimant suffered no additional functional impairment as a result of the incident on January 12, 2009. Respondent asserts claimant has no work disability because there is no nexus between his wage loss and his injury. Finally, respondent argues claimant cannot be permanently and totally disabled or entitled to work disability benefits because he never sought post-accident employment.

Claimant requests the Board affirm the ALJ's Award. However, claimant alleges respondent acted in bad faith when it denied that claimant met with personal injury by accident. At oral argument, claimant requested the Board issue sanctions against respondent.

The issues before the Board on this appeal are:

1. Did claimant meet with personal injury by accident?

2. If so, is claimant permanently and totally disabled?

3. If the Board finds that claimant met with personal injury by accident, did respondent act in bad faith? If so, does the Board have authority to issue sanctions?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

On the date of the regular hearing (July 25, 2011) claimant was 52 years of age. Claimant testified that he has performed manual labor his entire life. He dropped out of

school in the tenth grade, has no GED and has difficulty reading documents. Claimant has had no vocational training.

Claimant testified he was a full-time employee and operated a chainsaw clearing brush for respondent. On January 12, 2009, claimant was operating the chainsaw and cut down a large tree about 24 inches in diameter. He attempted to step around the tree, tripped on some brush and fell. Claimant fell on his right side and experienced pain in his lower back. He testified the pain was "[i]n my lower back real bad, my lower back. I couldn't get up off the ground for a little bit."[1] He remained on the job that day, but did no work. Claimant's back pain was so severe that a co-worker had to drive claimant home in claimant's vehicle. Claimant did not return to work the next day, and he has not worked for respondent or any other employer since.

Claimant suffered a prior lower back injury resulting from a work-related motor vehicle accident in 1999. He thought that he herniated the disk at L4-5. Claimant denied having any leg symptoms following that accident. Claimant did not undergo surgery as a result of the 1999 accident.

Following the 1999 accident, claimant quit or was terminated from three jobs after working less than a week at each, because he was unable to tolerate the physical demands of the work. Claimant testified it took him "about five years to get back on my feet strong again."[2] When he returned to work, claimant's jobs included working as a plumber's helper, which involved manual labor including bending and crawling, and working on a road crew mowing grass. Other work involved running water and sewer trucks and plowing snow. Claimant testified that work required him to bend and lift and carry 30 or 40 pounds. Claimant testified that prior to the fall on January 12, 2009, his back felt fine and that in the year prior to his fall, he had received no medical treatment for his back.

Claimant testified he reported the January 12, 2009, injury that same day to the County supervisor, Harry Wisdom. The next day, when claimant did not return to work because he was in too much pain, he spoke with Mr. Wisdom again. Mr. Wisdom told claimant to call John Tershner, respondent's foreman. Claimant contacted Mr. Tershner and told him about his injury. Mr. Tershner told claimant to go to the hospital.

On January 13, 2009, claimant went to the emergency room of Mercy Hospital at Fort Scott, Kansas, where he saw Dr. Parris. Apparently those records indicate claimant gave a history of low back pain, but did not mention the accident of January 12, 2009. Claimant testified that he told Dr. Parris of the accident. X-rays of the lumbar spine were taken and showed mild disk space narrowing at L1-L2 with mild degenerative changes and osteophyte formation noted.

---

[1] R.H. Trans. at 11.

[2] *Id.*, at 22.

Respondent's insurance carrier authorized Dr. Steven L. Hendler to provide treatment for claimant. Dr. Hendler first saw claimant on February 13, 2009. Claimant related details concerning the January 12, 2009, accident to Dr. Hendler and also informed him of the 1999 back injury. Claimant's current symptoms included back pain with pain into the right hip and right leg. Dr. Hendler physically examined claimant and reviewed the medical records and x-rays from Mercy Hospital. Upon examination by Dr. Hendler, claimant had tenderness to palpation of the right upper buttock with more significant tenderness to palpation of the right SI joint and positive Gillet's on the right. There was also milder tenderness to palpation of the lumbar paraspinal musculature on the right. There was no spasm appreciated or pelvic obliquity. Straight leg raise was negative bilaterally. Patrick's sign was negative at both hips.

Dr. Hendler indicated the January 13, 2009, x-rays showed minimal changes at L5-S1 and an upper lumbar osteophyte formation was noted. He diagnosed claimant with back pain and sacroiliac dysfunction on the right and indicated a lumbar MRI might be necessary to evaluate claimant for possible other etiologies. Dr. Hendler recommended Tramadol and/or anti-inflammatory medication, physical therapy and possible sacroiliac injections. He also indicated that claimant would be disabled for 4-8 weeks after treatment was commenced. In his report from the February 13, 2009, visit, Dr. Hendler responded to the question, "Is back pain related to current injury?" by stating, "The history, as provided by the patient, is consistent with a mechanism that would produce the findings on today's evaluation. I note some discrepancies between the records provided and the history today so definitive response cannot be made to this question."[3] Dr. Hendler referred claimant to Concentra for pain management.

On March 3, 2009, claimant began treatment at Concentra in Kansas City, Missouri. He initially saw Dr. Copening, who prescribed Darvocet, gave claimant temporary restrictions and ordered an MRI. The MRI revealed a small right neural foraminal disk herniation protruding 3 mm posteriorly with a small extruded herniation extending superiorly about 6 mm at L4-5. The MRI also showed mild impingement on the right L4 nerve root in the neural foramen and some mild degenerative changes at other levels with no other disk herniation or stenosis.

Claimant saw Dr. Peter C. Boylan at Concentra on March 19, 2009. He diagnosed claimant with lumbar radiculopathy and lumbar strain. Dr. Boylan assigned claimant temporary restrictions of no lifting over 10 pounds, no pushing or pulling over 10 pounds, and no bending more than 10 times per hour. He prescribed a series of epidural steroid injections, which were administered by Dr. Charapata in March and April 2009. The injections offered claimant little pain relief.

---

[3] Hendler Depo., Ex. 2.

On July 14, 2009, claimant saw Dr. Hendler and again reported pain into his right hip and right leg. The doctor noted that claimant had a positive Tinel's over the distal anterior calf reproducing dorsum pain and extending proximally up the shin. There was also significant tenderness to palpation of the right foot over the plantar surface of the hindfoot. Dr. Hendler indicated claimant's gait and stance were notable for the mild decrease in stance time on the right compared to the left. Dr. Hendler's impressions at this visit were back pain, sacroiliac dysfunction on the right, plantar fasciitis, and rule out superficial peroneal neuropathy.

Claimant saw Dr. Hendler several more times and claimant's treatment included physical therapy and injections. Claimant saw the doctor a final time on November 20, 2009. Dr. Hendler's impressions on that date were the same as those at the July 14, 2009, visit. Dr. Hendler indicated claimant was at maximum medical improvement (MMI). In his November 20, 2009, report Dr. Hendler made two statements regarding claimant returning to work: "Don't see that he would be able to progress from current level to prior level needed to return to work" and "He may resume modified duty."[4] With regard to permanent restrictions, it was Dr. Hendler's opinion that claimant "could lift 20 pounds occasionally, 10 pounds frequently, 5 pounds continuously, bend frequently, climb stairs only frequently, stand frequently, and sit continuously. He could push and pull 43 and 52 pounds respectively."[5] The doctor also indicated claimant could walk frequently.[6] Dr. Hendler testified the work restrictions were most likely related to claimant's back problem as opposed to claimant's foot and nerve issues.

Since reaching MMI, claimant has not applied for work in the labor market. Nor has he attempted to obtain his GED or additional education or training.

On February 12, 2010, Dr. Hendler provided an opinion that pursuant to the AMA *Guides*,[7] claimant had a 5% permanent functional impairment to the whole body as a result of claimant's right sacroiliac dysfunction. Dr. Hendler utilized DRE Lumbosacral Category II in determining claimant's impairment. He also opined that claimant's plantar fasciitis and superficial peroneal neuropathy were not related to claimant's accident. Dr. Hendler did testify that claimant had an altered gait, which was most probably related to claimant's sacroiliac dysfunction.

---

[4] *Id.*

[5] *Id.*, at 14.

[6] *Id.*, at 14, 15.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Based on a task analysis conducted by vocational rehabilitation counselor Terry L. Cordray, Dr. Hendler opined claimant could not perform 12 of 20 prior job tasks for a task loss of 60%. Dr. Hendler indicated claimant could work at the light physical demand level. He also opined claimant was capable of performing some jobs in the open labor market and gave examples of a courier and doing clerical work. Dr. Hendler acknowledged that claimant's lack of experience performing clerical duties and lack of computer skills could impede his ability to obtain clerical work.

At respondent's request, claimant saw Dr. Adrian P. Jackson, an orthopedic spine specialist, on August 17, 2009. His assessment of claimant was low back pain and bilateral lower extremity pain, sacroiliac joint dysfunction, and peripheral neuropathy in the right lower extremity which seemed more consistent with dysesthetic complaints claimant had in the foot. Dr. Jackson indicated claimant had signs of dysesthesias and hyperesthesias (in layman's terms, numbness) on the dorsal surface of his right foot. This was reproduced by Tinel's palpation of claimant's peroneal nerve. The doctor indicated claimant's right leg symptoms were related to the peroneal nerve at the fibular head and were not directly related to claimant's lumbar spine.

Dr. Jackson testified that he did not give claimant any specific restrictions for his low back and that he did not feel that restrictions would be warranted specifically for the low back, which included the sacroiliac joint. He also testified that he left Dr. Hendler's restrictions in place and left it to Dr. Hendler to address any further restrictions. Dr. Jackson opined that based upon the AMA *Guides* claimant's permanent functional impairment would be 5% (DRE Category II) for the low back pain, bilateral lower extremity pain and the sacroiliac joint dysfunction.

At the regular hearing, claimant testified that he was currently being treated by Dr. French of the VA for back pain. Dr. French prescribed Gabapentin which claimant was taking once or twice a day. Dr. French was also giving claimant a shot every two months. Claimant's medical records from the VA were not placed into evidence. When claimant takes Gabapentin, his pain is a 3 or 4, sometimes 5, on a scale of 1 to 10, with 10 being the worst pain. At his deposition, Dr. Jackson testified that Gabapentin is an anti-seizure medication that has a side effect of working on peripheral neuropathy. Its side effects are drowsiness and in some patients can actually cause seizures if it is stopped abruptly.

At the request of his attorney, claimant was seen by Dr. P. Brent Koprivica on March 11, 2011. Dr. Koprivica reviewed medical records from claimant's 1999 accident, including his own records, as he had evaluated claimant following that accident. Those records indicate claimant suffered a cervicothoracic strain and a lumbosacral injury. He noted that in 1999, claimant had severe diskogenic back pain at L4-5, a herniated nucleus pulposus at L4-5 and moderate diskogenic back pain at L3-4 . Subsequent to the 1999 accident, Dr. Koprivica opined claimant had an overall 20% functional impairment with regard to his lumbar spine and indicated that claimant could restrengthen to a medium physical demand level of activity.

Dr. Koprivica also reviewed claimant's post-2009 accident medical records, including those of Dr. Jackson. Dr. Koprivica opined that on January 12, 2009, claimant suffered a permanently aggravating injury to preexisting multilevel degenerative disk disease with the development of chronic mechanical low back pain. Dr. Koprivica also diagnosed claimant with ongoing sacroiliac dysfunction. Dr. Koprivica indicated claimant did not have active radiculopathy, but the sacroiliac joint likely caused pain radiating into his hip.

Pursuant to the *Guides,* Dr. Koprivica opined claimant had a 5% permanent functional impairment as a result of his 2009 accident. This was in addition to the overall 20% permanent impairment Dr. Koprivica assigned in 1999 with regard to claimant's lumbar spine.[8] His restrictions for claimant were no frequent or constant lifting or carrying; lifting and carrying of 20 pounds or less on an occasional basis; no lifting from floor level; captive sitting intervals of less than one hour; standing and walking intervals of less than 30 minutes with the flexibility of changing between sitting, standing and walking on an ad lib basis if necessary; rarely squat, kneel or crawl (these activities should be limited cumulatively to less than 5% of an eight-hour day); no climbing; and no work activities where claimant would be exposed to jarring or whole body vibration, which would include operating heavy equipment or commercial driving.

Dr. Koprivica acknowledged that he placed permanent restrictions on claimant following claimant's 1999 accident. However, the 1999 restrictions would allow claimant to perform tasks requiring medium-level exertion as defined by the Dictionary of Occupational Titles (DOT). The additional restrictions imposed by Dr. Koprivica after the 2009 accident would preclude claimant from performing at the sedentary level. Based upon the restrictions he placed on claimant with regard to the January 12, 2009, injury, Dr. Koprivica opined claimant could no longer perform 16 of 18 job tasks identified by vocational consultant Michael J. Dreiling for an 89% task loss. He also opined that claimant is realistically unemployable as a result of the injuries he suffered on January 12, 2009.

At the request of his counsel, claimant was interviewed by vocational consultant Michael J. Dreiling on May 2, 2011. He obtained a work history from claimant and determined that claimant performed 18 specific job tasks in the 15 years prior to his 2009 accident. Mr. Dreiling reviewed the restrictions Drs. Koprivica and Hendler placed upon claimant. Mr. Dreiling's report indicated that claimant was 51 years old, has a ninth grade education, has difficulties reading and writing, has no GED or high school diploma, has no typing skills, has no computer skills, has a history of performing physically oriented work, has no transferrable job skills, has significant medical restrictions, and describes significant problems with any type of prolonged sitting, standing, or walking.[9] Mr. Dreiling opined the restrictions placed upon claimant by Dr. Koprivica would preclude claimant from performing sedentary work and that claimant is realistically and essentially unemployable. Upon cross-

[8] Koprivica Depo. at 14.

[9] Dreiling Depo., Ex. 2.

examination, Mr. Dreiling indicated that if Dr. Hendler's restrictions were utilized, claimant could perform four or five of six tasks required to care for lawns.

Terry L. Cordray, a vocational rehabilitation counselor, interviewed claimant at respondent's request on July 15, 2011. He obtained a work history from claimant and determined that claimant performed 20 specific job tasks in the 15 years prior to his 2009 accident. Mr. Cordray reviewed claimant's medical records, including the medical records of Drs. Jackson, Koprivica and Hendler, and the report of Mr. Dreiling. Based upon the restrictions of Drs. Hendler and Koprivica, Mr. Cordray opined claimant could be a cashier. Mr. Cordray acknowledged that some cashier jobs required stocking shelves and lifting items from floor level and that Dr. Koprivica's restrictions would preclude claimant from performing those cashier jobs. He indicated that claimant could be a cashier at a parking garage, but then admitted no such jobs existed in Linn County, where claimant resides. According to the DOT, the job of cashier requires an individual to have "level two" mathematic and language skills. Mr. Cordray indicated that he does not know if claimant has "level two" mathematic and language skills.

Mr. Cordray indicated claimant's biggest vocational barrier is not having a GED. He testified that claimant has never attempted to get a GED or enroll in adult basic education classes, which are free. Mr. Cordray acknowledged the last classroom training claimant likely underwent was 34 years ago in the U.S. Army. He also admitted he did not test claimant to determine his academic ability, mathematic skills, reading and writing skills or IQ.

The ALJ determined claimant met with personal injury by accident on January 12, 2009. Respondent admitted that if there was an accidental injury, it arose out of and in the course of claimant's employment with respondent. The ALJ found that claimant's average weekly wage was $420.00. ALJ Avery found claimant had a 5% permanent whole body functional impairment from his 2009 accident and concluded that claimant was permanently and totally disabled. The ALJ also determined claimant had a 100% wage loss and a 62% task loss, which calculates to an 81% permanent partial disability. He also gave respondent a credit of $16,198.57 for a preexisting 15% whole body impairment.

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[10]

K.S.A. 2008 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

K.S.A. 44-510e requires that functional impairment be determined based upon the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment. The Board has held that any preexisting functional impairment must also be determined utilizing the same criteria.[11]

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[12]

In *Wardlow*,[13] the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

---

[10] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[11] *Leroy v. Ash Grove Cement Company*, No. 88,748, 66 P.3d 944 (Kansas Court of Appeals unpublished opinion filed April 4, 2003).

[12] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

[13] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

In its brief, respondent cites *Logsdon*[14] in support of its argument that claimant's 2009 injury was a consequence of the 1999 injury which never fully healed. Logsdon suffered a work-related left shoulder injury in 1993. In 2004, Logsdon slipped and fell while attempting to feed his dogs and dislocated his left shoulder. He felt the same pain in the left shoulder as he did after the original accident. He then applied for post-award medical benefits. Dr. Mills opined that, but for Logsdon's 1993 accident and injury, he would not have suffered an injury as a result of the relatively trivial accident claimant suffered in 2004. The Kansas Court of Appeals determined Logsdon's 2004 injury was the natural consequence of his compensable 1993 injury and affirmed the Board's finding that he was entitled to post-award medical benefits.

Claimant argues the facts of this claim are closer to those in *Flowers*[15] than to *Logsdon*. Flowers alleged a work-related left knee injury on April 25, 2006. He suffered an earlier knee injury in the early 2000s and had left knee surgery in 2001. Flowers testified that although he had problems with his knee in the early 2000s, he had not sought medical treatment nor missed work because of his knee for over four years until he tripped and fell at work in 2006. The employer in *Flowers* cited *Logsdon* in support of its contention that Flowers' left knee injury was a direct and natural consequence of his earlier knee injury. The Court held *Logsdon* did not apply as Flowers suffered a new and separate injury.

ANALYSIS

Respondent raises several arguments in support of its assertion that claimant did not meet with personal injury by accident. Respondent argues there were no witnesses to claimant's accident, the report of Dr. Parris at Mercy Hospital does not state that claimant reported his back pain was caused by a work-related injury, and that claimant did not report that he fell to the ground to Dr. Hendler. These arguments are unpersuasive and ignore several critical facts.

Immediately following the accident, claimant's back pain was so severe that he performed no further work the rest of the day. Claimant had to be driven home in his own vehicle by a co-worker. The next day claimant went to the emergency room at Mercy

---

[14] *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

[15] *Flowers v. Payless Shoesource, Inc.*, No. 100,866, 209 P.3d 764, 2009 WL 1858487 (Kansas Court of Appeals unpublished opinion filed June 26, 2009).

Hospital to seek treatment for his back injury. Claimant testified he told Dr. Parris the back injury occurred when he tripped over some brush and fell at work.

From January 13, 2009, through November 20, 2009, claimant received medical treatment and was temporarily totally disabled. Claimant endured several epidural injections, was prescribed several medications, including pain medications, and underwent physical therapy. He was also given temporary restrictions by Drs. Hendler and Boylan. No evidence was presented to contradict claimant's version of events.

Respondent contends that claimant's 1999 injury never fully healed and that the accident on January 12, 2009, reaggravated claimant's previous injury. Respondent asserts claimant's 2009 injury is a natural and probable consequence of his 1999 injury and, therefore, is not the responsibility of respondent. *Logsdon* was cited by respondent to support its argument. Claimant asserts the facts of this claim are more akin to those in *Flowers.* The Board concurs. From 2000 until the day after his 2009 accident, claimant sought no medical treatment for his back. Claimant returned to manual labor work after his 1999 accident. Respondent's assertion that claimant never fully healed after the 1999 injury is not buttressed by the evidence in the record.

In 1999, claimant suffered a cervicothoracic strain and lumbosacral injury. In 2009, claimant again suffered a lumbosacral injury, but also incurred an injury to his sacroiliac joint. Drs. Hendler, Jackson and Koprivica diagnosed claimant with sacroiliac dysfunction which resulted from his 2009 accident. No medical evidence was presented which indicated claimant had sacroiliac joint problems following his 1999 accident. There is substantial and credible evidence to prove that claimant's sacroiliac joint dysfunction was a new injury that resulted from the 2009 accident.

Additionally, no physician testified that but for claimant's 1999 injury, he would not have suffered his 2009 injury. Little, if any, medical evidence was presented that claimant's 2009 injury was the natural and probable consequence of his 1999 injury or that claimant's 1999 injury had never fully healed. Simply put, claimant met his burden of proof that by a preponderance of the evidence, he met with personal injury by accident on January 12, 2009.

Following claimant's 2009 accident, Dr. Koprivica placed significant restrictions upon claimant. He opined claimant would be limited to performing jobs that were less than the sedentary level. Both Dr. Koprivica and Mr. Dreiling opined that claimant is realistically unemployable. Mr. Dreiling took into consideration the fact that claimant completed only the ninth grade, had a work history of holding only manual labor jobs, did not know how to type, had no computer skills and had difficulty reading.

Dr. Hendler testified that his restrictions placed claimant in the light physical demand level. He indicated that claimant could not go back to doing manual labor. Dr. Hendler opined claimant could physically perform the work of a courier or a clerk. Mr. Cordray

indicated that utilizing Dr. Hendler's restrictions, claimant could work as a cashier. However, Mr. Cordray admitted that he did not test claimant to determine if he had the mathematic and language skills necessary to be a cashier. He also acknowledged that a person who had previous experience working as a cashier would have an advantage over claimant if both sought the same cashier position.

The Board finds that claimant is permanently and totally disabled whether the restrictions of either Dr. Koprivica or Dr. Hendler are utilized. *Wardlow* requires a fact finder to look at the totality of a worker's circumstances when considering whether the worker is permanently and totally disabled. The opinions of Dr. Hendler and Mr. Cordray that claimant could work as a cashier, clerk or courier largely ignore the physical requirements of those positions; claimant's non-physical limitations; the side effects of claimant's medication; and that claimant uses pain medication, yet has continuous pain. Many clerical and cashier jobs would require claimant to exceed Dr. Hendler's physical restrictions. With claimant's lack of typing or computer skills, difficulty reading and his work experience, it is highly improbable that an individual of claimant's age could obtain employment as a clerk or cashier.

Respondent argues a determination cannot be made that claimant is permanently and totally disabled because claimant has not sought post-injury employment. The Board disagrees. The prerequisite of seeking post-injury employment was clearly repudiated by the Kansas Court of Appeals in *Herrera-Gallegos*[16] when it said:

> We are at a loss to understand the logic of this argument. It's obviously contradictory to require someone who is, in the words of our statute, "completely and permanently incapable of engaging in any type of substantial and gainful employment" to put forth a good-faith effort to find and maintain gainful employment. See K.S.A. 44-510c(a)(2). A job search in that circumstance would be the very definition of a fool's errand.

In his brief to the Board and at oral argument claimant's attorney argued that respondent acted in bad faith when it denied that claimant sustained a personal injury by accident. At oral argument, claimant's counsel requested the Board to issue sanctions against respondent. This issue was not raised by claimant's attorney at the regular hearing nor in his submission brief to the ALJ. While respondent's arguments on the issue of personal injury by accident are inefficacious, the Board finds that respondent did not act in bad faith.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[17] Accordingly, the findings

---

[16] *Herrera-Gallegos v. H & H Delivery Service, Inc.,* 42 Kan. App. 2d 360, 367, 212 P.3d 239 (2009).

[17] K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

CONCLUSION

1. Claimant sustained a personal injury by accident.

2. Claimant is permanently and totally disabled.

3. Respondent did not act in bad faith by denying that claimant met with personal injury by accident.

AWARD

WHEREFORE, the Board affirms the October 6, 2011, Award entered by ALJ Avery.

IT IS SO ORDERED.

Dated this ____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Daniel L. Smith, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge